mitted by the mileage rules, quoted *supra*. To accumulate this near-maximum mileage, the five petitioners would make a round trip from Columbus to Birmingham and back 12 times in one month of thirty days. The round trip was 314 miles. This trip would be completed in one day. Thus, the petitioners would regularly report for work 12 days in a 30-day month. The remaining 18 days in each month were theirs to do with as they pleased. This mileage—3760 miles in one month—enabled each of the five petitioners to earn in excess of $650 each month, and a yearly annual income in excess of $7,000.

The addition after March 1, 1957, of a sixth man to the four scheduled trains on which the petitioners were employed reduced the average mileage earned by the petitioners to 3140 miles per month (R. 123). This would have been below the minimum of 3200 miles per month in freight service required by the mileage rules before the March 1, 1957, agreement became effective. It is materially above the 3000 mile minimum limit in freight service that has been in effect since March 1, 1957.

A new job was thus created for a sixth man in the petitioners' group as a result of the February 21, 1957, agreement. This sixth job, or "swing man" job, has been held most of the time since March 1, 1957, by one of the senior Negro firemen (R. 156-'57), notwithstanding an affidavit by one of the petitioners that the swing job is held by a white fireman. (See R. 14, and 619 (p. 9 of District Court's opinion.)) When taking the swing job the Negro fireman vacated some other assignment, and this assignment was in turn filled by some fireman having less seniority than the swing man. Eventually, the effect of adding the swing man was a recall to work of some junior fireman on the lower part of the fireman's seniority

roster who had theretofore been without employment (R. 131-133).

Negro firemen have traditionally been passed over by management when calling up firemen to establish, through examinations, their qualifications for promotion to engineers. And Negro firemen are now protected by permanent injunction from the need to comply with the forced promotion rule (R. 10-11). These circumstances, and the attrition of passing time, have resulted in the Negro firemen becoming the senior firemen on the Central of Georgia Railway, and the junior firemen being predominantly white employees. It follows from this circumstance that restrictive regulation of the firemen's mileage will likely cause some senior Negro firemen to earn less mileage, and more jobs will become available for firemen on the lower positions of the seniority roster.

Petitioners assert that regulating firemen's mileages under these circumstances is one form of hostile, racial discrimination prohibited by the consent injunction entered in the *Washington* case on March 25, 1952. *Whether or not the regulation of firemen's mileages under these circumstances is prohibited by the terms of the March 25, 1952, injunction, is the issue that was decided by the courts below.* Having had the benefit of a trial, followed by briefs, the District Court stated its ultimate finding as follows:

> "After a careful consideration of all of the interveners' contentions and all evidence adduced, this Court is convinced that no discrimination, and hence no contempt has been shown." (R. 618.)

This finding and conclusion is based upon a detailed analysis by the District Court of petitioners' charge of racial discrimination and their evidence. The Court's

analysis and reasoning is reproduced at pages 614 to 625 of the Record herein.

The Court of Appeals for the Fifth Circuit affirmed the District Court's findings in their entirety. At page 12 of the petition for certiorari, petitioners make this statement regarding the review by the Court of Appeals of the District Court's findings:

> "On July 2, 1959, the Court of Appeals without analysis or opinion, affirmed the judgment of the District Court 'on the basis of his reported opinion below.' "

The implication of this statement is that the Court of Appeals restricted its review of the case to a mere examination of the District Court's opinion. The Per Curiam opinion by the Court of Appeals justifies a different conclusion. The essential part of this opinion reads as follows:

> *"The background facts, analysis of issues, and reasoning have been fully and accurately set forth by District Judge Bootle, and his fact findings amply satisfy the clearly erroneous test of F. R. Civ. P. 52 (a).* Accordingly we affirm the judgment finding no discrimination under these circumstances on the basis of his reported opinion below." (P. 19, Appendix A, petition for writ of certiorari.) (Emphasis ours.)

Other courts, in addition to the District Court for the Middle District of Georgia and the Court of Appeals for the Fifth Circuit, have concurred in findings to the effect that the regulation of firemen's mileages on the Central of Georgia Railway, including particularly the addition of the sixth man to the petitioners' group in March, 1957, was not an act of discrimination against the Negro firemen, prompted by considerations of race or color. The District Court that heard the case of *Oliphant v. Brotherhood of*

Locomotive Firemen and Enginemen, cited by petitioners, found that the agreement effective March 1, 1957, which reduced the minimum mileage limitations applicable to firemen employed on the Central of Georgia Railway "was a legitimate practice used by most unions for reasons other than discrimination." The District Court concluded thus:

> "* * * this court cannot state definitely that this Brotherhood adopted these practices for the purpose of discrimination against Negroes." (156 F. Supp. 89, at 90.)

An appeal was taken by the plaintiffs in the *Oliphant* case from the District Court's findings and conclusions. The Court of Appeals for the Sixth Circuit confirmed the District Court's findings. The Court of Appeals stated its conclusions regarding the charge of racial discrimination as follows:

> "In his carefully considered opinion, Chief Judge Paul Jones decided the facts pertaining to discrimination adversely to the contention of appellants * * *
>
> "A meticulous examination of the detailed record in this case has been made by us, resulting in our opinion that the above findings of the District Court are eminently correct and are supported by substantial evidence. There is, therefore, no occasion for further consideration of appellants' second argument." (262 F. 2d 359, at 360.)

Certiorari was denied in the *Oliphant* case. (355 U. S. 893.)

The upshot is that two District Courts and two Courts of Appeals have weighed the evidence presented by the petitioners in support of their charge that the Brotherhood has been subjecting the petitioners herein to discriminatory treatment of a hostile character in connection with the regulation of firemen's mileages on the Central of Georgia Railway.

The Supreme Court's Rule Regarding Finality of Findings Concurred in by Two Lower Courts.

The finality attached by this Court to findings concurred in by two courts below appears to have been settled for a very considerable period of time, and consistently adhered to.

On December 16, 1889, this Court handed down a decision in the case of *Dravo v. Fabel*, 132 U. S. 487, in which the plaintiff had sought to have certain deeds to real estate set aside on the grounds that the conveyances were fraudulent and void as to the grantor's (Dippold) creditors and assignees in bankruptcy. The results of the proceedings in the lower Federal courts were summarized by this Court as follows:

> "Conceding that the case was an uncommon one, and that some of its circumstances tended to excite suspicion as to the integrity of the transaction between Dippold and his grantees, the conclusion of the District Court was that the clear weight of the evidence was on the side of the defendants, and that the bill should be dismissed. It was accordingly so decreed. *Dravo v. Fabel*, 25 Fed. Rep. 116. A similar decree was passed in the Circuit Court."

This Court affirmed the judgment below, adding the following explanations:

> "The case comes within the ruling in *Lammers v. Nissen* (Sup. Ct. Rep. Lawyer's Ed. Book 25, p. 562), where the finding of the court of original jurisdiction, upon a mere question of fact, was affirmed by the Supreme Court of the State. Chief Justice Waite said: 'Under these circumstances, we ought not to disturb the judgment of the state court unless the error is clear. No less stringent rule should be applied in cases of this kind than that which formerly governed in admiralty appeals, when two courts had found in the same way on a question of fact.'

"Without stating the evidence in detail, we content ourselves with saying that, upon a careful review of all circumstances disclosed by the record, we do not feel justified in disturbing the conclusion reached by the District and Circuit Courts upon mere questions of fact."

This Court has many times affirmed and adhered to the rule stated in the *Fabel* case, that it will not undertake to review the evidence of record when there are concurrent findings by two courts below, unless it be shown that the findings are clearly erroneous.

Stuart v. Hayden, 169 U. S. 1, at 14 (1898).

Baker v. Cummings, 169 U. S. 189, at 198 (1898).

Towan v. Moore, 173 U. S. 17, at 24 (1899);

Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401, at 412 (1904);

Dun v. Lumbermen's Credit Assoc., 209 U. S. 20, at 24 (1908);

Washington Securities Co. v. United States, 234 U. S. 76, at 78 (1914);

Gilson v. United States, 234 U. S. 380, at 383 (1914);

Baker v. Schofield, 243 U. S. 114, at 118 (1917);

United States v. O'Donnell, 303 U. S. 501, at 508 (1938);

Williams Manufacturing Co. v. United Shoe Machinery Corp., 316 U. S. 364, at 367 (1942);

District of Columbia v. Pace, 320 U. S. 698, at 702 (1944);

Goodyear Tire & Rubber Co. v. Ray-O-Vac Co., 321 U. S. 275, at 278 (1944);

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U. S. 271, at 275 (1949);

Allen v. Trust Co. of Ga., 326 U. S. 630, at 636 (1946).

In *Baker v. Schofield, supra,* the purpose of the proceeding was to set aside a fraudulent conveyance. The District Court and the Court of Appeals found that the conveyance was not bona fide. On certiorari, this Court spoke as follows:

> "Our consideration of the evidence must be governed by the well-settled rule in this court that, when two courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it is clear that their conclusion was erroneous * * * the concurrent decisions of the courts upon the establishment of a trust as a question of fact will be followed unless shown to be clearly erroneous."

In *Allen v. Trust Co., supra,* the action was against the Collector of Internal Revenue to recover an estate tax which had been levied upon property allegedly conveyed by the decedent in contemplation of death. The District Court concluded that the acts of the decedent had not been undertaken in contemplation of death. The Circuit Court sustained the findings of the District Court. On certiorari to this Court, the effect of concurrent findings of fact by the two courts below was stated by this Court as follows:

> "Many gifts, even to those who are the natural and appropriate objects of the donor's bounty, are motivated by 'purposes associated with life, rather than the distribution of property in anticipation of death.' * * * These motives cover a wide range. * * * These may be the desire to recognize special needs or exigencies or to discharge moral obligations. * * * Whether such a desire was the dominant, controlling or impelling motive is a question of fact in each case. * * * Here two courts have resolved that question of fact in favor of respondents. * * * These findings, being concurrent findings of the two lower courts,

will be accepted here without re-examination of the evidence."

The respondent would have supposed that the issue of racial discrimination had been eliminated from this case by the concurrent decisions of the courts below, unless the petitioners came before this Court prepared to demonstrate that the findings by the courts below are "clearly erroneous."

The petition for certiorari filed herein takes no note of this Court's long-established rule against disturbing concurrent findings made by two courts below. The petitioners' statement of the case, and the reason advanced as to why this Court should grant the writ, proceed as if the issue of racial discrimination would be before this Court on a *de novo* basis if certiorari were granted.

Facts Bearing Upon Petitioners' Charge of Racial Discrimination.

The Central of Georgia Railway is divided for administrative purposes into three operating divisions, and these divisions comprise five seniority districts. One of the operating divisions is the Columbus Division. This Division consists of two seniority districts. These are known as the Columbus Seniority District and the Cedartown Seniority District. The petitioners' employment is confined to the Columbus Seniority District of the Columbus Division (R. 246-249).

In considering the rule nisi which required the Brotherhood and the Central of Georgia Railway to show cause why they should not be punished for contempt of court, the question uppermost was how to prove the existence of a negative situation, to wit, the *absence of intent* to subject the petitioners to discriminatory treatment

of a hostile character. It appeared to the respondents that if the court were provided with pertinent information relative to every train regularly operated over the lines of the Central of Georgia Railway, including information as to the name and race of each assigned fireman and the mileage each would normally be able to earn during one or more average periods, the court would have a reliable basis for determining whether the addition of a sixth man to the petitioners' group in March, 1957, put the petitioners in an unfavorable position relative to other firemen holding regular jobs anywhere on the Central of Georgia Railway. This composite summary was accordingly assembled by the respondent in a document designated "Chart A," which is reproduced in the Appendix attached hereto. Chart A was designated defendants' Exhibit B at the trial, and admitted into evidence (R. 387).

Each train, or group of related trains, described in Chart A has been given a number for identification purposes. This number appears in the left hand column on each page of Chart A. The Court's attention is first invited to page 4a of Chart A. This is a summary of all *passenger* trains operated by the Central of Georgia. The Court will observe at the foot of page 4a that the average mileage that the firemen, both white and colored, earned during the first 15 days of March, 1957, was 1602 miles, which is the equivalent of 3204 miles per month. Between January 1st and 15th of 1958, these firemen earned an average of 1772 miles, or an average of 3544 miles in a month. The Court will recall that the mileage rules in effect after March 1, 1957, prescribed a minimum mileage limit of 3800 miles per month in passenger service (R. 192).

Thus, the firemen assigned to the passenger trains that are being operated by the Central of Georgia Railway

fall considerably short of earning even the *minimum* limit of 3800 miles per month contemplated by the mileage rules.

The Court's attention is next invited to pages 1a, 2a, and 3a, of the Appendix. These pages present a summary of what may fairly be described as the "ordinary" *freight* trains regularly operated by the Central of Georgia Railway. The Court will observe at the foot of page 3a that for the period of April 1 to 15, 1957, the firemen assigned to these trains averaged 1518 miles, or a total of 3036 miles in a month. During the period of January 1 to 15, 1958, they averaged 1512 miles, or 3,024 miles per month.

The fact should be apparent that these mileages have been brought as close to the minimum limit of 3000 miles per month set by the February 21, 1957, agreement as is practicable.

A detailed review of the information relative to each one of the trains listed on Chart A was provided by the Brotherhood's General Chairman, Mr. A. B. Healan. This testimony is recorded at pages 250 to 329 of the Record.

Page 5a of the Appendix is a summary of four "extraordinary" freight trains or pools of freight trains, and also of two "extraordinary," regularly scheduled, passenger trains. These trains are designated "extraordinary" to distinguish them from the other trains described on pages 1a to 4a, of the Appendix. The reason they are designated "extraordinary" is because the firemen holding jobs on these trains are able to average well above the minimum limits prescribed by the mileage rules. These situations exist because the distances between terminals, and other circumstances, make it impossible to reduce the mileages earned by the firemen on these trains by the addition of swing men or pool men without reducing their mileages well below the 3000 mile limit in freight service and the

3800 mile limit in passenger service. These runs are described in detail in the testimony of General Chairman Healan beginning at page 329 of the Record.

It will be noted that between April 1st and 15th, 1957, the firemen on the freight trains described on page 5a of the Appendix averaged 1854 miles, which amounts to an average of 3708 miles per month. Between January 1 and 15, 1958, these firemen averaged 1917 miles, or 3834 miles per month.

The Court should observe that of the firemen assigned to these "extraordinary" runs, the great majority are Negro firemen. During the later check period, in January, 1958, there were 14 colored firemen and 1 white fireman on these trains. If the petitioners are to be understood as complaining of the advantages these jobs provide mileage-wise, their complaint to this extent is necessarily *dehors* the charge of racial discrimination.

The trains listed in Chart A provide a complete summary of all of the opportunities for employment available to firemen over the entire Central of Georgia Railway, save for one important exception. This exception consists of what is known as the "extra board" of firemen maintained on each of the five seniority districts comprising the Central of Georgia Railway. These extra boards invariably consist of the younger firemen, and the men report for work on a first-in first-out basis when called to fill vacancies occasioned by the laying off for any reason of regularly assigned firemen. More will be said later about the adjustment of mileages earned by the men on the extra boards. The unemployed firemen on each seniority district are those whose seniority is less than the seniority of the firemen whose names make up the extra board.

The mileages indicated on Chart A are the mileages firemen assigned to each of the trains or group of trains

described in Chart A would earn if they reported for duty regularly, and did not work overtime or earn other minor sums because of extraordinary conditions occasionally encountered during a tour of duty. The respondent believed these additional increments of earning would average out for all firemen to a fairly uniform sum over a period of time, so that the *actual* available miles provided by each job assignment listed in Chart A would provide a fair, relative measure of the job held by each regularly employed fireman on the Central of Georgia Railway.

However, counsel for the petitioners were not satisfied with this assumption, and so they insisted during the first days of the trial that the true picture of the "sordid story" and "ugly system" petitioners have been subjected to in the guise of mileage regulations, would be revealed only if the true payroll records were brought before the Court (R. 373-386). The District Court accordingly continued the trial from February 6 to April 4, 1957, and ordered the Central of Georgia, as requested by petitioners, to furnish its payroll records for all firemen employed on the Columbus Division (Columbus and Cedartown Seniority Districts) for the months of July and December, 1956, and the full year of 1957. These records were reproduced on I. B. M. tabulator sheets and are sizeable exhibits, designated Plaintiffs' Exhibits 3 to 8, inclusive (R. 553).

In order that the pertinent information contained in these payroll records would be available to the District Court in a usable and informative manner, the respondent prepared Charts B to H, inclusive, from the data contained in these exhibits. These charts are reproduced in the Appendix to this brief.

Chart B, which appears on page 7a of the Appendix, is a list of the names, in alphabetical order, of the Negro

firemen employed on the Columbus and Cedartown Seniority Districts during the months of July and December, 1956. This Chart discloses the miles run and the dollars earned by each of the Negro firemen in the months of July and December, 1956.

These payroll records disclose that the petitioners' average earnings per month shortly before the agreement reducing the minimum mileage limits was put into effect on March 1, 1958, were as follows:

Al Marshall	$ 610.65
Major Simpson	660.88
Will Covington	614.19
Jim Mullins	642.31
Marion Vincent	559.43
TOTAL	$3,087.46

Chart C, reproduced on pages 8a to 10a of the Appendix, provides similar information relative to the earnings of the white firemen employed on the Cedartown and Columbus Seniority Districts during July and December, 1956.

Chart D, on page 11a of the Appendix, shows the wages earned by the Negro firemen employed on the Columbus Seniority District during the year *1957*. The petitioners' average monthly earnings during this period were as follows:

Al Marshall	$ 603.01
Major Simpson	617.51
Will Covington	633.73
Jim Mullins	627.55
Marion Vincent	603.94
TOTAL	$3,085.74

Chart E, on pages 12a to 14a of the Appendix, discloses the wages earned during the year 1957 by each

white fireman employed on the Columbus Seniority District. These earnings are broken down so as to disclose what each white fireman earned working as fireman, and, if he worked as hostler or as engineer at any time during 1957, these earnings are recorded separately. Total earnings appear in the right-hand column.

Chart F, on page 15a of the Appendix, is a comparative table of the 1957 earnings of the 16 Negro firemen employed on the Columbus Seniority District and the earnings of the 16 *highest paid white firemen* employed on the same district. It will be noted that the only white fireman who earned any material amount more than was earned by the petitioners was W. Burke, Jr. A glance at Chart G discloses that Burke worked almost full time as an engineer. He earned only $648.34 as a fireman during the year 1957, while earning $7,907.46 working as engineer.

Chart F discloses that the average earnings of *all* Negro firemen employed on the Columbus Division during the year 1957 was $7,090.99. The five petitioners herein earned an average of $7,401.49. The fact should be noted that these are the earnings of the petitioners during the year in which the "swing man" was a member of the petitioners' work group after March 6 of that year (R. 531).

These figures deserve comparison with the average earnings of the 16 highest paid white firemen, all of whom had previously been promoted to engineer and worked as engineers during a substantial part of 1957 (disclosed by Chart E). The average *total* earnings of these sixteen white firemen, including W. Burke, Jr., was $7,020.31 during 1957.

The average total earnings during the year 1957 of all of the white firemen employed on the Columbus Seniority District was $3,950.28.

Finally, we invite the Court's attention to Chart G, at page 17a of the Appendix. This chart provides a graphic illustration of the relative earnings during the year 1957 of all firemen having seniority on the Columbus Seniority District, including engineers who worked at any time as firemen during the year 1957. The names on this roster are in the same relative order that they appear on the firemen's seniority roster on the Columbus Seniority District. The length of the bar to the right of the name corresponds to the earnings of that man during 1957. The black bars represent the Negro firemen. The white firemen as far down the list as number 85 have all been promoted to engineer and worked as engineers during some period in 1957.

Thus, the payroll records serve the petitioners' cause no better than did the summary of the trains operated over the lines of the Central of Georgia Railway presented by Chart A. As a matter of fact, the payroll records serve the petitioners' purpose less than did the information in Chart A for the payroll records establish beyond cavil that the petitioners' earnings continue at a rate that places them at the peak of the firemen's roster, earningswise.

Beginning on page 7 and continuing through page 10 of the petition for certiorari, petitioners tell this Court, as they did the courts below, that there has been no regulation of white firemen's mileages on the Central of Georgia Railway to lower levels. In short, what the petitioners would have this Court believe is that the Brotherhood and the Central of Georgia Railway, while under a permanent injunction forbidding them to subject Negro firemen to hostile discrimination based upon racial distinctions, entered into the agreement of February 21, 1957, with the purpose in mind of reducing the petitioners' mileages for the benefit of junior white firemen and with no intention

of enforcing the lowered mileage limits against white firemen.

Petitioners say that not one example of lowering a white firemen's mileage was proved by the defendants; yet a study of the Record, particularly from pages 437 to 453, shows constant effort on the part of petitioners' counsel to exclude testimony by General Chairman Healan—testimony giving examples of the regular enforcement of the lowered mileage limitations against the pools and extra boards composed of white firemen throughout the Central of Georgia Railway.

In contrast with the four freight trains on which the five petitioners have held the jobs of firemen for years, operating between Columbus, Georgia, and Birmingham, Alabama, on a fixed schedule, the vast majority of freight trains are not operated on a fixed schedule. They operate unscheduled, proceeding from terminal to terminal when ready, and the jobs of fireman on these trains are frequently filled by a group of firemen commonly referred to as a "pool." The firemen comprising a pool follow a regular order in responding to calls to work. Mileage earned by firemen operating in a pool is regulated by increasing or decreasing the number of men in the pool on regular checking dates, usually the 1st and 15th of each month.

Adding a man to a pool of firemen, or keeping a man in the pool when it might otherwise be necessary to remove him from the pool because of higher mileage limitations, produces precisely the same effect on the earnings of the men in the pool as does adding a swing man to a group of firemen holding jobs on a group of regularly scheduled freight trains. This is true notwithstanding the repeated efforts by petitioners' counsel throughout the trial to prevent introduction of evidence by respondent ii-

lustrating the application of the March 1, 1957, reduction of the minimum mileage limits to pools of firemen and to the extra boards (R. 400-426).

As stated at an earlier place in this brief, each of the five seniority districts comprising the Central of Georgia Railway maintains an "extra board" of firemen. The extra board provides the substitutes to meet the carrier's need for firemen to fill the jobs of firemen assigned to regular runs but who fail for any one of a variety of reasons to report for duty. The need for additional firemen in the freight and passenger pools is also provided by the extra board on each seniority district (R. 208). When fewer firemen are needed in the freight and passenger pools, those that are not needed are returned to the extra board, and the total number on the extra board is reduced by returning the firemen with the least seniority to an unemployed status.

The mileage run by firemen working in freight and passenger pools, and working off the extra boards, is recorded by them in the carrier's offices when they return from each trip. On the 1st and 15th of each month the records of the mileage accumulated by each fireman is totalled, and then the Brotherhood's local chairman and the carrier's local officer agree on whether additions should be made to the pools and the extra boards, or the number of firemen reduced (R. 218-220). This is the means by which the mileages earned by firemen working in the pools and off the extra boards are kept regulated to a level that is consistent with the current Brotherhood policy of spreading the available work (R. 348-349).

It would have been out of reason to have loaded the trial record in this proceeding with a reproduction of the carrier's records showing the mileages earned by the firemen in each pool and on each extra board, on each of the

five seniority districts, for each two-week period from March 1, 1957, to the date of trial, for the purpose of proving that the reduced minimum mileage limits that were made effective March 1, 1957, have been consistently and conscientiously enforced throughout the Central of Georgia Railway. Reason dictated that this proof be limited to a few examples (R. 572-573). These examples are in the Record at pages 340, 358-365, 438-448, 459-462, and 560-605. They were made a part of the record in the face of firm insistence by counsel for the petitioners that the best evidence rule and the hearsay rule be strictly observed notwithstanding the proceeding was not being tried before a jury (R. 358-365, 557-567).

The lowering of the minimum mileage limits on March 1, 1957, served to spread the work by creating additional jobs in two ways. First, it permitted the *addition* of men to pools and to the extra boards. Naturally, the addition of a man, or men, to a pool or extra board will lower the mileage earned by the other men in the pool or board. Since the mileages earned should be kept at the minimum or above, it follows that by lowering the minimum, the available mileage can be divided among more men. Second, lowering the mileage limits also had the effect of allowing men to *stay* in the pools and on the extra boards when it would have been necessary to reduce their number to prevent their mileages from dropping below the former minimums of 3200 miles in freight service and 3800 miles in passenger service (R. 449-454).

The Director of Personnel on the Central of Georgia Railway, Mr. W. J. Collins, was a witness at the trial and testified to the uniform enforcement throughout the Central of Georgia Railway of the February 21, 1957, agreement reducing the firemen's minimum mileage limitations. After testimony as to how the agreement came into being

(R. 520-526), Mr. Collins then testified regarding the systemwide application of the agreement as follows:

> "Q. And of course this rule that we are dealing with, the rule change, it had application, or has application over the entire system?
>
> A. Oh, yeah.
>
> Q. All firemen?
>
> A. Yes, sir.
>
> Q. Both whites and Negroes?
>
> A. Applies to every fireman on it, under that contract." (R. 526.)

No effort was made on cross examination by petitioners' counsel to discredit these singularly important statements by the Director of Personnel. See the Record at pages 528 and 529.

Counsel for the petitioners has tried throughout this proceeding to embellish their claim of racial discrimination by asserting that because white firemen often have seniority rights as engineers or as hostlers in addition to seniority rights as firemen, while Negroes have rights to employment only as firemen, the earning power of the Negro suffers in comparison with the white fireman. The petitioners say that after a white fireman has accumulated in one month all of the mileage permitted by the firemen's rules, it is common practice for the employee to take a job as hostler or as engineer for the remainder of the month.

This is a wholly mistaken concept.

The petitioners did not support this contention during the trial by introducing payroll records, although, as we have pointed out, they obtained a court order requiring the carrier to produce payroll records for other purposes. The only support in the record for this contention is the personal conclusions expressed by petitioners Al Marshall and Major Simpson on direct examination. Marshall's tes-

timony is found at pages 140-141 of the Record, and Major Simpson's testimony is found at pages 167 to 170.

However, on cross examination Marshall testified that he was unable to support his opinion by so much as one name or one instance of a white fireman being allowed to work out the remainder of the month as an engineer or hostler after having accumulated all of the mileage permitted by the firemen's mileage rules for one month. Furthermore, Marshall correctly qualified his testimony on direct examination by admitting that a fireman is permitted to take a run as engineer or hostler after accumulating a month's mileage working as fireman *only when the need for his service is in the nature of an emergency*, caused by a train being ready to start its run and there being no regular engineer available to take the job. The carrier must then press into service any available man qualified to do the job. (See the Record at pages 148 to 150.)

Major Simpson testified on direct examination that he had observed demoted engineers R. L. Upchurch, R. B. Gable, and T. J. Murphy supplementing their earnings as firemen by working as engineers during the same months in which they had been demoted to the firemen's craft and were working as firemen. But on cross examination Simpson admitted that he had simply observed the three demoted engineers on passing trains sitting on the right side of the locomotive cab, and Simpson admitted that he had no knowledge as to whether these demoted engineers had already accumulated the full mileage permitted by the firemen's rules at the time he saw them working as engineers.

General Chairman A. B. Healan testified emphatically while being cross examined that "*the only way a white fireman can catch a trip as an engineer after getting*

mileage as a fireman is in emergencies when we have no other engineers, and the same thing would work with these firemen (referring to Negro firemen). They would be used in other firing classes, and hostler helping in emergencies. It works both ways." (R. 496-500.)

The contention that white employees, after completing a month's work as firemen, regularly augment their earnings as firemen by taking jobs as engineers or hostlers during the remainder of the month is completely dissipated by the payroll records disclosing the earnings in each class of service of the white firemen employed on the Columbus Seniority District, reproduced in Chart E of the Appendix.

Since demoted firemen, R. L. Upchurch, R. B. Gable, and Jack Murphy, were particularly singled out by the petitioners as illustrations of this alleged privilege that white firemen enjoy, a breakdown of the earnings of these employees has been reproduced as Chart H on page 19a of the Appendix, and to demonstrate how "unfavorably" the petitioners' earnings compare with the "favored" white employees, we have also reproduced on Chart H the petitioners' 1957 earnings.

Notwithstanding the fact that petitioners' contention has no statistical support whatever in the evidence offered by them at trial, and the payroll records furnished by the carrier at the District Court's order positively and completely refute the idea that white enginemen have cumulative opportunties for earnings of which they regularly avail themselves, disparately to the Negro firemen, the petitioners nevertheless come before this Court urging the same fallacious argument. See Footnote 7, page 9, of petition for certiorari.

The agreement of February 21, 1957 is part and parcel of a national program or policy adopted by the 1953

Convention of the Brotherhood of Locomotive Firemen and Enginemen (R. 220-230). This policy was occasioned by the seriously depressed employment condition which prevails throughout the railway industry.

The petitioners tell this Court, at page 11 of their petition, that the policy formally adopted by the Brotherhood's 1953 Convention authorized the negotiation of agreements which would reduce the level of the firemen's mileages but which would not result in a reduction of take-home pay. Therefore, petitioners say, the February 21, 1957, agreement which reduced the firemen's mileage limits on the Central of Georgia Railway is violative of the Brotherhood's own policy because the enforcement of this agreement caused a reduction in pay.

To judge the credibility of this statement, we invite the Court's attention to pages 222 to 224 of the Record, where is reproduced the resolution as first proposed to the 1953 Convention by Lodge No. 724, and the terms of the resolution as finally adopted.

The Court will observe that the petitioners have selected from the proposed resolution the one statement that can be used to serve their purpose, while they silently by-pass the instructive part of the resolution as adopted by the Convention, which declares that practical considerations inherent in the collective bargaining process will necessitate lower mileage limitations, *and earnings*, in advance of any demand for higher pay rates. We quote from the resolution as follows:

> "We also believe that, to demonstrate sincerity of purpose to reduce mileage limitations to provide a decent work week on one hand for those who are now employed and on the other hand to provide employment opportunities for our younger members, who may soon find themselves unemployed, we must

take a positive stand for lower mileage limitations in both road and yard service.

"We further believe that such lower mileage limitations, and earnings, will be required in advance of any demand for higher pay-rates, as it has been proven, time and time again that the railroads are using excessively high earnings of the few as evidence before wage tribunals in opposition to increased wage rates and that they have been successful in their efforts through such evidence.

"We also recognize that the question of mileage reductions is, and has been, a controversial issue since the early days of the old Chicago Joint Agreement."

The resolution concludes by referring the adopted policy to the Brotherhood's President and the Brotherhood's Association of General Chairmen for further handling (R. 22). The Convention action was followed by formal consideration and decision at a meeting held in Chicago in September, 1955, by the Association of General Chairmen, in which General Chairman Healan participated (R. 228-230).

General Chairman Healan testified to having personal knowledge that agreements reducing the firemen's mileages had been put into effect on the Wheeling & Lake Erie Railroad, the Monon Railroad, Western Maryland Railway, Georgia & Florida Railway, Minnesota & Western Railway, Boston & Albany, and the Elgin, Joliet & Eastern Railway (R. 229).

Even before the adoption by the 1953 Convention of a national policy favoring the lowering of firemen's mileage generally, the Brotherhood's general chairman on the Atlantic Coast Line Railroad authorized the addition of swing men and pool men under circumstances that reduced the average mileage earned to well below the

minimum levels then prescribed by the firemen's agreement. The propriety of this action was challenged by members of the Brotherhood determined to earn the maximum permitted by the agreement, but on August 18, 1954, the highest appellate tribunal within the Brotherhood unanimously affirmed such action by the general chairman when prompted by conditions of unemployment in the firemen's craft (R. 349-352).

The steady contraction of jobs in the railway industry in recent years has received such wide publicity as to have become a fact of common knowledge to all persons concerned with matters of public welfare. Ten years ago there were 1,660,000 jobs in the railway industry. *Fifty percent of those jobs have vanished.* Employment in the railway industry at the time of trial was less than 997,000 persons (R. 215). By August, 1959, employment on Class I railroads had dropped to 819,689. (Monthly Report M-300, Interstate Commerce Commission, Bureau of Transport Economics and Statistics.)

During the same ten-year period, 30,000 firemen's jobs vanished from the railroads (R. 215). These losses are the result of forces that are in addition to the natural attrition that characterizes a diminishing industry. This disappearance of jobs has been accelerated, particularly in the firemen's craft, by the rapid and technological change resulting from the wholesale substitution of multiple-unit Diesel locomotives for the steam locomotive. General Chairman Healan testified:

> "They don't add trains any more, they add locomotive units. Where they used to run, we'll say, three trains, today they run one." (R. 215.).

Of this development, Director of Personnel, W. J. Collins, testified:

"Q. Now, Mr. Collins, from your experience as Director of Personnel I assume you are fairly well apprised of the number of firemen as well as engineers and others, for that matter, on the Central of Georgia. Has there been a downward trend in the number of firemen who actually are working?

A. Well, I don't know. I have never kept any figures or even concerned myself with that because I never had any occasion to, but just off hand I would generally say that they have particularly due to the advent of the Diesel power, because we are hauling in one train today what we used to haul in two or three, seventeen or eighteen cars, something like that, back before we got Diesels, with steam power, why we would have had a couple or about three trains running, and there was a fireman on every train, so there's obliged to have been a downward trend in not only firemen but all railroad employees.

By the Court: Are all of your engines Diesels now?

A. Yes sir, we are completely Dieselized.

Q. Freight and passenger?

A. Yes, sir, everything. We don't have a steam locomotive on the railroad in service, and I don't know if we have one or not." (R. 527).

The employment situation on the Central of Georgia Railway fully reflects the increasing unemployment on a national scale in the railway industry.

During the past 10 years the Central of Georgia Railway has discontinued operation of *24 passenger trains*, including the famous "Southland" (R. 219, 220), and jobs for firemen have shrunk in eight years from 251 to 189 (R. 216).

In order to put before the Court the conditions of unemployment in the firemen's craft on the Central of Georgia Railway as of March 1, 1957, the Brotherhood

added to the evidence adduced in open court the depositions of five unemployed firemen, one from each of the five seniority districts on the Central of Georgia Railway (R. 555). From the Savannah District, T. C. Madison testified that he stood No. 77 on a roster of 97 firemen as of January 1, 1958; that he had had no work during January and February, 1957; and that all firemen below him on the firemen's roster were similarly unemployed. Of the 97 firemen with employment rights on the Savannah District, 21.8% of them were unemployed during a substantial period preceding March 1, 1957.

From the Southwest Seniority District of the Macon Division, J. R. Holt testified that he was the 64th man down on the firemen's roster; that there was a total of 81 men on the roster; and that on January 1, 1947, he and all the firemen below him on the roster were without work. This means that 22.2% of the firemen on this roster were unemployed.

From the Atlanta District W. F. Smith testified to the effect that he was in 74th position from the top of the firemen's roster; that there was a total of 97 firemen on this roster; that he has been continuously unemployed since December 15, 1957; and that during January and February, 1957, 24.7% of the firemen on the Atlanta District were without work.

From the Cedartown Seniority District of the Columbus Division W. E. Fowler, Jr. testified to the effect that he was number 31 on a roster of 48 firemen; that he and 17 firemen below him, or a total of 37.5% of all firemen having employment rights on the Cedartown District were out of employment on March 1, 1957. Fowler added that he has had no regular work as a fireman on the Central of Georgia since 1951—a period of seven years.

The unemployment situation on the district where petitioners are employed fully reflects the general situation. Fireman J. E. Floyd's testimony discloses that he stood 89th down on a roster of 126 names; that during January and February, 1957, he held no regular assignment, was not a member of any pool, that his name was on the extra board only occasionally, and that *37 firemen below him were unemployed.* Thus, 30.1 per cent were unemployed on the district to which the petitioners belong.

Graphic proof of this condition is provided by the payroll records upon which Chart G in the Appendix was constructed. (This Chart is a complete roster of firemen on the Columbus Seniority District except for a few promoted men whose names were omitted from the top because they performed no work as firemen during 1957.)

Adverting to Chart G, the Court will note that the 98th name on this roster is H. E. Crowley; that there is a total of 120 firemen having employment rights on the Columbus Seniority District, and that, with the exception of Firemen Gradic, Dudley, and Morgan, *there was no work whatever available for Crowley and the 21 men below him during the year 1957.* The three exceptions referred to earned but a pittance during 1957.

To this less than sanguine picture of employment conditions in the firemen's craft, must be added a recent development that threatens to virtually eliminate the firemen's craft from the railway industry. Nation-wide publicity by the press and the radio is currently being given to a recent announcement joined in by all of the major railroads in the country to the effect that they intend to achieve in the near future, through collective bargaining, the elimination of the fireman from all freight train crews and all switching crews operated by these railroads.

The Reason Stated by Petitioners for Granting the Writ.

The petitioners make the following statement at page 13 of their petition:

> "Petitioners are the victims of an ugly system of racial discrimination in the exercise of the all-white Brotherhood's exclusive statutory bargaining power."

If the only evidence contributed by the defendants to the record before this Court consisted of Chart A, a description of all of the trains regularly operated on the Central of Georgia Railway, with the mileage that each fireman assigned to these trains will normally earn; and Charts B to H, which summarize the information provided by the carrier's payroll records on the Columbus Seniority District, this evidence standing alone should refute the petitioners' contention that the reduction of their mileage effected on March 6, 1957, constituted discriminatory treatment of a hostile character prompted by racial considerations. The payroll information summarized by Charts B to H establishes beyond dispute that the petitioners continue, notwithstanding the March 1, 1957, lowering of firemen's mileage limitations, to enjoy the peak earnings positions on their seniority district.

What the petitioners are in fact contending for in this proceeding is that their earnings may not lawfully be reduced below the *maximum* specified by the firemen's mileage rules because of the circumstance that they occupy senior positions on the firemen's roster while white firemen predominate in the lower positions of the roster. The existence of this circumstance means that any reduction of the petitioners' mileage is reasonably certain to result, at least ultimately, in the creation of jobs for unemployed *white* firemen at the lower end of the seniority roster.

This is the petitioners' case for racial discrimination.

The statement by the petitioners at page 13 of their petition for certiorari that the findings and judgments rendered by the courts below disregard the decision by this Court in the *Steele* case would be an irrelevance even were it true. This is the case because the only issue decided by the courts below was whether the agreement to reduce the minimum mileage limitations effective March 1, 1957, on the Central of Georgia Railway and its enforcement was forbidden *by the terms of the March 25, 1952, injunction*: If the mileage reduction experienced on and after March 1, 1957, by the petitioners, under the circumstances disclosed by the record, was not forbidden by the language of the injunction, then surely the contempt proceeding should be at an end.

If the judgment entered by the Court of Appeals is brought by certiorari to this Court for review, it seems to the respondent that the only question that will be open for consideration by this Court will be this, to-wit: Are the findings that were concurred in by the courts below so clearly erroneous that the judgment entered below must be reversed, and new findings supporting the petitioners' contention be made by this Court?

Respectfully submitted,

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